IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 16TH NOVEMBER 2007 / 25TH KARTHIKA 1929

AFA.No. 17 of 2002

AGAINST THE JUDGEMENT AND DECREE OF THE LEARNED SINGLE JUDGE OF THIS COURT DATED 6.8.2001 IN AS.198/1991.
OS.20/1990 OF SUB COURT, QUILANDY

APPELLANTS: LEGAL REPRESENTATIVES OF 5TH RESPONDENT:
LEGAL REPRESENTATIVES OF 5TH DEFENDANT:

1. M.P.LATHIKA, WIDOW OF V.K.RAJEEVAN,
VELLACHALANKANDY HOUSE, BALUSSERY P.O.,
CALICUT - 673 612.

2. V.K.DHANYA, D/O. V.K.RAJEEVAN,
VALLACHALANKANDY HOUSE, BALUSSERY P.O.,
CALICUT - 673 612.

3. V.K.DHANRAJ, S/O. V.K.RAJEEVAN,
VALLACHALANKANDY HOUSE, BALUSSERY P.O.,
CALICUT - 673 612.

BY ADV. SRI.V.V.ASOKAN

RESPONDENTS: ADDL.APPELLANTS & RESPONDENTS 2,3,4,6,7,8 AND OTHER LEGAL REPRESENTATIVES OF DECEASED 1ST RESPONDENT: PLAINTIFF & DEFENDANTS 2, 3,4, 6, 7, 8 AND OTHER LEGAL REPRESENTATIVES OF THE 1ST DEFENDANT:

1. JAYASREE SIVANAND,
DHANLAKSHMI NILAYAM, PALATHUPARAMBU,
KUTHIRAVATTOM, CALICUT.

2. LATHIKA CHANDRAMOHAN,
PURUSHOTHAMAN & CO: KANNUR.

3. RANGEETHA RAJESH, RAGAM,
PANAYAPPALLY, COCHIN-5.

4. V.MURALEEDHARAN, KRISHNA,
JAWAHAR NAGAR HOUSING COLONY,
EAST NADAKAVU, CALICUT.

5. DR.JITHENDRA KUMAR, KRISHNA,
JAWAHAR NAGAR HOUSING COLONY,
EAST NADAKAVU, CALICUT.

6. NARESH KUMAR, KRISHNA,
JAWAHAR NAGAR HOUSING COLONY,
EAST NADAKAVU, CALCIUT.,

7. VALSALA BALAN,
W/O. LATE VALLACHALANKANDY BALAN, KRISHNA,
JAWAHAR NAGAR HOUSING COLONY, EAST NADAKAVU,
CALICUT.

8. V.K.YADHUNADHAN, AMARAPURI,
VATTOLI BAZAR, BALUSSERY, KOZHIKODE.

9. V.K.JEEVARAJ, AMARAPURI,
VATTOLI BAZAR, BALUSSERY, KOZHIKODE.

10. DAYAVATHI, M.A. COTTAGE,
MAYAKKAL ROAD, MAHE.

11. V.K.HEMA, W/O. ACHUTHAN,
MALAYIL HOUSE, MAKKADA,KAKKODI, KOZHIKODE.

12. V.K.AJITHA, KOMMADATH HOUSE,
NADUVATTOM, ARAKKINAR, KOZHIKODE-3.

13. V.K.SARALA, THACHARAKKAL NALUKANDATHIL,
ELATHUR, KOZHIKODE.

14. BABY, WIDOW OF VELLACHALANKANDY BHASKARAN
AMARAPURI, VATTOLI BAZAAR, BALUSSRY, KOZHIKODE.

15. VINEETHA SIVANANDAN, AMARAPURI,
VATTOLI BAZAAR, BALUSSERY, KOZHIKODE.

16. JYOTHI SURESH, AMARAPURI,
VATTOLI BAZAR, BALUSSERY, KOZHIKODE.

R1 TO R7 BY ADV. SRI.P.G.PARAMESWARA PANICKER (SR.)
SRI.P.GOPAL
SRI.V. SIVASWAMY
SRI.K.I.M. METHER
SRI.A.K. JOSE
SRI.JOSE JOSEPH
R15 & R16 BY ADV. SRI.M.C.RATNAKARAN

THIS APPEAL FROM FIRST APPEAL HAVING BEEN FINALLY HEARD ON 15/11/2007, THE COURT ON 16/11/2007 DELIVERED THE FOLLOWING:

C.M.P.NO.1409/2002 IN A.F.A.NO.17/2002

DISMISSED

SD/- P.R.RAMAN, JUDGE

16/11/2007 SD/- K.T.SANKARAN, JUDGE

//TRUE COPY//

AHZ/

P.R.RAMAN & K.T.SANKARAN,JJ.

A.F.A. NO. 17 OF 2002

Dated this the 16th November, 2007

JUDGMENT

SANKARAN, J.

The question of law involved in this appeal is whether the donee to whom immovable property was gifted along with her three sons, with a condition that she would have a life estate, is entitled to claim the protection under Section 14(1) of the Hindu Succession Act; or whether it would come under Section 14(2) of the said Act.

2. The AFA arises out of a suit for partition in respect of eleven items of immovable properties. The appellants herein are the legal representatives of defendant No.6. The plaintiff and defendants 1 and 2 are the children of Kumaran Vaidyar and Janaki. Defendants 5 to 9 are the legal representatives of the first defendant. Defendants 3 and 4 are the legal representatives of the second defendant. Kumaran Vaidyar died on 8.8.1967 and his widow Janaki died on 6.8.1991. Item Nos.1 and 2 admittedly belonged to Kumaran Vaidyar. In this appeal, we are concerned with only item Nos.1 and 2. Item Nos.3 to 8 belonged to Janaki, the mother of the plaintiff and defendants 1 and 2. Item Nos.9 to 11 belonged to Kumaran Vaidyar. Plaintiff claimed a one-third share in the plaint schedule properties. The trial court passed a preliminary decree for partition in respect of item Nos.9 to 11. On appeal by the plaintiff, a learned single

Judge of this Court in modification of the preliminary decree passed by the court below passed a decree granting one-third share to the plaintiff in item Nos.1, 2 and 9 to 11.

3. Item Nos.1 and 2 and another item of immovable property were gifted by Kumaran Vaidyar as per Ext.A1 gift deed, dated 28.4.1961. According to the plaintiff, the gift was in favour of Janaki and her children together, with a life estate in favour of Janaki in respect of item Nos.1 and 2 in the gift deed (which are item Nos.1 and 2 in the plaint schedule). According to the contesting defendants, item Nos.1 and 2 were gifted by Kumaran Vaidyar to Janaki and item No.3 in the gift deed was gifted in favour of the plaintiff and defendants 1 and 2. The defendants contended that Janaki had absolute title over item Nos.1 and 2 and that there was no creation of a life estate in her favour.

4. In respect of item No.3, there was an earlier suit for partition as O.S.No.82 of 1980, filed by the present plaintiff. The defendants therein, who are defendants 1 and 2 in the present suit, set up an oral partition as a defence. That contention was not accepted and the suit was decreed by the trial court, which was confirmed by this Court in Ext.A4 judgment, dated 24.1.1990. In Ext.A4 judgment, the High Court found that as per the gift deed, dated 21.4.1961, three items of immovable properties were gifted by Kumaran Vaidyar in favour of his wife Janaki and their three children. It

was also found that in respect of item Nos.1 and 2 in the gift deed, a life interest was granted to Janaki.

5. In the appeal against the preliminary decree in the present suit, namely, O.S.No.20 of 1990, the learned single Judge held that Janaki did not get any absolute right over item Nos.1 and 2 as per Ext.A1 gift deed and she had only a life estate. The learned single Judge also took note of the appellate judgment in respect of O.S.No.82 of 1980 (Ext.A4) and it was held that even assuming that Ext.A4 would not operate as res judicata, it would operate as a judicial precedent.

6. The contesting defendants had put forward a contention that there was an oral partition among the parties. They also put forward a contention that Janaki had executed a registered Will dated 13th July, 1979 (Ext.B1). As per the Will, the plaint item Nos.3 and 4 came to vest in the first defendant and items Nos.5 and 6, in the second defendant. It was also contended that item Nos.7 and 8 were bequeathed by Janaki in favour of defendants 3 and 4. The trial court found that the case of oral partition set up by the defendants is not true. Ext.B1 Will was found to be genuine by the trial court. On appeal, the learned single Judge confirmed the finding of the trial court as regards Ext.B1 Will. It was also held that item Nos.1 and 2 are partible.

7. Sri.Mayankutty Mather, learned counsel for the appellants, put forward two contentions. They are the following: (1) As per Ext.A1 gift deed, an absolute estate was created in favour of Janaki and, therefore, item Nos.1 and 2 are not parible, as she had disposed of her rights therein under Ext.B1 Will, and (2) Even if the first contention is not accepted, it could certainly be found that the properties were gifted to Janaki under Ext.A1 in lieu of maintenance and, therefore, Section 14(1) of the Hindu Succession Act would apply.

8. Sri.P.G.Parameswara Panicker, learned senior counsel appearing for the first respondent/plaintiff contended that on a proper interpretation of Ext.A1, the finding of the learned single Judge that only a life estate was created in favour of Janaki, could be sustained. He submitted that Section 14(1) of the Hindu Succession Act does not apply at all as there was no pleading that item Nos.1 and 2 were allotted to Janaki in lieu of maintenance and that this contention is put forward for the first time in this appeal. He also submitted that Section 14(1) would not apply at all and Section 14(2) would clearly apply in the case.

9. We shall consider the points referred to above together.

10. On a careful consideration of the recitals in Ext.A1, we are of the view that no absolute estate is created in favour of Janaki. She was given

a right to possess and enjoy item Nos.1 and 2 during her life time. Therefore, Janaki could not have disposed of by way of Will, the title in respect of item Nos.1 and 2. As held by the learned single Judge, the intention of the donor was also to confer a life interest in favour of Janaki. We agree with the reasoning and conclusion made by the learned single Judge on this point.

11. There is no case for the defendants in their pleadings that item Nos.1 and 2 were allotted to Janaki in lieu of maintenance and, therefore, Section 14(1) of the Hindu Succession Act, 1956 would apply. No such contention was put forward by the defendants before the learned single Judge as well.

12. For the sake of convenience, Section 14 of the Hindu Succession Act is extracted below:

> "**14. Property of a female Hindu to be her absolute property**:-- (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> *Explanation*:-- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *Stridhana* immediately before

the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

13. Sri.Mayankutty Mather relied on the decisions reported in **Vaddeboyina Tulasamma and others** v. **Vaddeboyina Sesha Reddi** (AIR 1977 SC 1944 = (1977) 3 SCC 99), **Shakuntla Devi** v. **Kamla and others** (2005) 5 SCC 390, **Jose** v. **Ramakrishnan Nair** (2003(3) KLT 999), **Balwant Kaur and another** v. **Chanan Singh and others** ((2000) 6 SCC 310), **Pachu** v. **Chirutha** (2003 (1) KLT 241) and (1978 Madras 21).

14. Sri.P.G.Parameswara Panicker relied on the decisions reported in **Gumpha and others** v. **Jaibai** ((1994) 2 SCC 511), **F.M.Devaru Ganapathi Bhat** v. **Prabhakar Ganapathi Bhat** ((2004) 2 SCC 504) and **Kunji Thomman and others** v. **Meenakshi and others** (AIR 1970 Kerala 284).

15. **In Vaddeboyina Tulasamma and others** v. **Vaddeboyina Sesha Reddi** (AIR 1977 SC 1944 = (1977) 3 SCC 99), the Honourable Supreme Court considered the scope and ambit of Section 14 of the Hindu Succession Act. In that case, a Hindu widow claimed maintenance out of

the joint family properties of her deceased husband in the hands of his brother. The suit was decreed in favour of the widow. In execution of the decree, a compromise was arrived at between the parties and properties were allotted to the widow for her maintenance. She was granted limited interest in such properties and the allotment was in lieu of maintenance. As per the terms of the compromise, on the death of the widow the properties were to revert to the plaintiff in the subsequent suit. The widow leased out certain items and sold certain other items. The reversioner filed the suit for a declaration that the alienations made by the widow were not binding on the plaintiff. The Supreme Court held as follows:

> ".. It will, therefore, be seen that sub-sec.(1) of Section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was subsequently acquired and possessed, she would become the full owner of the property."

The Supreme Court also held that Section 14(2) is more in the nature of a proviso or exception to sub-section (1). It was further held thus:

> "Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation as possible to sub-section (1) and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. This constructional approach finds support in the decision in Badri Prasad's case (supra) where this Court observed that sub-section (2) "can come into operation only if acquisition in any of the methods enacted therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property"."

The Supreme Court also considered the Hindu Succession Bill, 1954 and the inclusion of gift and Will in Section 14(2) of the Act, which was not available in the Bill. Taking note of this, the Supreme Court further held:

> ".. This circumstance would also seem to indicate that the legislative intendment was that sub-section (2) should be applicable, only to cases where acquisition of property is made by a Hindu female for the first time without any pre-existing right – a kind of acquisition akin to one under gift or will. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property."

16. In ***Tulasamma's case*** the Supreme Court also held as follows:

> "But where property is acquired by a Hindu female under an instrument for the first time without any pre-existing right solely by virtue of the instrument, she must hold it on the terms on which it is given to her and if what is given to her is a restricted estate, it would not be enlarged by reason of sub-section (2). ..... It is, therefore, clear that under the Sastric Hindu Law a widow has a right to be maintained out of joint family property and this right would ripen into a charge if the widow takes the necessary steps for having her maintenance ascertained and specifically charged on the joint family property and even if no specific charge is created, this right would be enforceable against joint family property in the hands of a volunteer or a purchaser taking it with notice of her claim. The right of the widow to be maintained is of course not a jus in rem since it does not give her any interest in the joint family property but it is certainly jus ad rem, i.e., a right against the joint family property. Therefore, when specific property is allotted to the widow in lieu of her claim for maintenance, the allotment would be in satisfaction of her jus ad rem, namely, the right to be maintained out of the joint family property. It would not be a grant for the first time without any pre-existing right in the widow. The widow would be getting the property in virtue of her pre-existing right, the instrument giving the property being merely a document

> effectuating such pre-existing right and not making a grant of the property to her for the first time without any antecedent right or title."

In ***Tulasamma's case***, Justice Fazal Ali in His Lordship's separate judgment summarized the legal conclusions at paragraph 70 in AIR (paragraph 62 in SCC). Sub-paragraphs (3) and (4) therein are as follows:

> "(3) Sub-section (2) of S.14 is in the nature of a proviso and has a field of its own without interfering with the operation of S.14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by S.14(1) or in a way so as to become totally inconsistent with the main provision.
>
> (4) Sub-section (2) of S.14 applies to instruments, decrees, awards, gifts etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-s.(2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee."

17. In **Shakuntla Devi** v. **Kamla and others** (2005) 5 SCC 390 and **Balwant Kaur and another** v. **Chanan Singh and others** (2000) 6 SCC 310, the Supreme Court followed the decision in ***Tulsamma's case.*** In

Balwant Kaur's case the recitals in a Will in favour of the widowed daughter of the testator making provision for maintenance by allotting properties were under consideration. It was stipulated that after the death of the widowed daughter the properties would revert to the testator's brothers or their legal heirs. The Supreme Court held that the widowed daughter had a right under the Hindu Adoptions and Maintenance Act, 1956 to claim maintenance from her father and therefore, the allotment under the Will was in recognition of a pre-existing right in the widowed daughter. It was held that Section 14(1) of the Hindu Succession Act would apply. The Supreme Court held as follows:

> "It is easy to visualise that if the testator had created a life interest to the extent of 1/3rd of his property in favour of his maidservant or a female cook who might have served him during his lifetime, then such female legatees could not have claimed benefit of Section 14(1) and their claim would have been confined only to Section 14(2) as they would not have any pre-existing legal right of maintenance or dependency qua the estate of the deceased employer but Appellant 1, as a destitute widowed daughter of the testator, stands on entirely a different footing. The Will in her favour does not create for the first time any such right as might have been created in favour of a maidservant or a cook. In fact, the Will itself recognises her pre-existing right in express terms and provides that even after his death, his other legatee brothers have to look after the welfare of his widowed daughter. Under these circumstances, Section 14(1) can legitimately be pressed into service by the learned Senior Counsel for the appellants on the basis of legal right flowing to her under the relevant provisions of the Maintenance Act. Once that conclusion is reached, the result becomes obvious."

18. In **C.Masilamani Mudaliar and others** v. **The Idol of**

Sri.Swaminathaswami Swaminathaswami Thirukoli and others (AIR 1996 SC 1697), the question considered was whether an alienation made by a widow to whom properties were bequeathed so as to provide maintenance was legal or not. It was held by the Supreme Court that Section 14(1) of the Hindu Succession Act would apply and that Section 14 (2) would not apply. To quote:

> "28. The legatee Sellathachi had right to maintenance under the Hindu Adoption and Maintenance Act when the property was given to her for maintenance. It must be in lieu of her pre-existing right to maintenance and the property given under the will, therefore, must be construed to have been acquired by the legatee under the will in lieu of her right to maintenance. That right to maintenance to a Hindu female received statutory recognition under the Hindu Adoption and Maintenance Act, 1956. She is entitled to realise maintenance from property of her husband and even in the hands of strangers except the *bona fide* purchasers for value whether notice of her right she is equally entitled under Section 37 of the Transfer of Property Act to have charge created over the property for realisation of her maintenance. On the demise of the testator, she being the class – I heir but for the bequeath, is entitled to succeed as an absolute owner. In either of those circumstances, the question emerges whether she acquires a limited right under Section 14(2) for the first time under the will. In the light of the facts and circumstances of the case and the legal setting, we are of the considered view that she having had under Sastric law, as envisaged in the will, the properties in recognition of her pre-existing right to maintenance, it is not a right acquired for the first time under the instrument will, but it is a reflection of the pre-existing right under the Sastric law, which was blossomed into an absolute ownership after 1956 under Section 14(1) of the Act."

19 In **Gumpha and others** v. **Jaibai** ((1994) 2 SCC 511), the last male holder in the family, who had two wives, executed a Will in favour of

his wives for life and after their lives, to the only daughter. One of the widows executed a Will in favour of a stranger. The question was whether the widow could validly execute a Will and whether she had only a limited estate. The Supreme Court held that the widow had only a limited estate and Section 14(2) of the Act would apply. It was held thus:

> "... That the legislature was aware of the unrestricted power of a Hindu to dispose of his property in any manner he considered proper subject to such restrictions as were operating in different schools is clear from sub-section (2) of Section 14. It does not curtail or erode the absolute estate which comes into operation by law but excludes from it specifically the property acquired in the manner mentioned therein. That is if any property is acquired by a female Hindu as provided in sub-section (2) then it would be beyond the purview of sub-section (1). Reason for it was that the legislature never intended to confer larger estate on females than on males. If a Hindu could bequeath his property of which he was capable of and could create life interest or restricted estate for a male it would have been incongruous to create an absolute estate in favour of female. Sub-section (2) of Section 14 was read as proviso or exception to sub-section (1) so that it may impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). In *Tulasamma* it was observed that, 'it cannot be construed in a manner which would rob sub-section of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1)'. True it is an exception to sub-section (1) and should be read in such a manner as not to rob sub-section (1), 'of that modicum of certainty which it must always possess'. Yet the field of operation of the two sub-sections is independent and separate. The legislature while obliterating the dark side of Hindu Law could not have intended to encroach upon right which existed under customary law and which it widened by adding explanation to Section 30.
>
> ..... The legislature as explained earlier was aware of absolute power of a Hindu to bequeath his property. But this right did not exist in joint family property or in various other properties under customary law. That has now been

> specifically recognised by Section 30. A Hindu can bequeath his interest even in joint Hindu property. But what is its effect on the right of his widow if the testator gives only right of maintenance. Can it be said to be in lieu of maintenance? The answer is simple. The legislature then would have used the words, 'for maintenance' and not instead of 'or in lieu of maintenance'. That could not have been the purpose. Under the Act, a female unlike customary law is an heir. She inherits the property in her own right. The expression 'in lieu of maintenance' or 'arrears of maintenance' would thus become inapplicable. Apart from it a right of maintenance under a will after 1956 would fall under sub-section (2) as even on ratio in *Tulasamma* it would be creation of right for the first time and not in recognition of pre-existing right. Even the expression in any manner whatsoever cannot be of any help for deciding the right and interest of a female Hindu acquired under a will. The expression is no doubt very wide but its width cannot be extended to those acquisitions which are specifically dealt with by sub-section (2). Its operation has to be confined to such an acquisition which is not covered by sub-section (2) or any of the clauses of the explanation. It is true that the explanation is not exhaustive as is clear from the use of the word 'includes' but its ambit cannot be stretched so as to nullify the effect of sub-section (2). A reading of the two sub-sections together indicates that even though the law was revolutionized and a female Hindu was made an absolute owner in respect of any property acquired by her either before or after the date of enforcement of the Act yet the law did not intend to confer a higher and better right than what was enjoyed by a male Hindu. ..... Consequently if a female Hindu acquires possession after the enforcement of the Succession Act and that possession was traceable to an instrument or a document described in sub-section (2) then she could not get higher right than what is stipulated in the document itself..."

20. In the case on hand, Ext.A1 gift deed was executed in 1961, much after the commencement of the Hindu Succession Act. The rights which a widow had under the pristine Hindu Law gave way to a larger right to a widow under the Hindu Succession Act and she became a class-I heir.

The widow would inherit the estate of a male Hindu dying intestate, as provided in Section 8 of the Hindu Succession Act. It is true that a Hindu wife is entitled to get maintenance from her husband under Section 18 of the Hindu Adoptions and Maintenance Act, 1956. But, such right is to be enforced under law and the property of the husband made a charge. Without an order of court or a stipulation in the deed or any other binding instrument, the property of a male Hindu would not automatically become subject of a charge for the maintenance payable to the wife at a future point of time. The properties in question were not gifted in lieu of maintenance or arrears of maintenance. There is no pleading or proof to that effect. Ext.A1 gift deed also does not indicate that it was executed in lieu of maintenance or arrears of maintenance. It is the admitted case of the parties that item Nos.3 to 8 of the plaint schedule belonged to Janaki, the donee under Ext.A1. Ext.B1 Will executed by her shows that those items were acquired by her in 1955, 1956 and 1957. This would indicate that she had her own properties at the time when her husband executed Ext.A1 gift deed. It is also relevant in this context that the properties gifted under Ext.A1 were the self acquired properties of the donor. He had absolute control and right of alienation over those properties. In such circumstances, the restrictions on alienation by a coparcener of the joint family property, under the pristine Hindu Law would not be applicable in the case of the property covered by Ext.A1 gift deed. That the gift deed was executed after the commencement of the Hindu Succession Act is also a

relevant factor in construing the impact of the restrictions provided in the gift deed. In the light of the principles laid down by the Supreme Court as referred to above, we are of the view that Ext.A1 gift deed conferred only limited estate on Janaki which was not capable maturing into an absolute right under Section 14(1) but which was covered by Section 14(2) of the Hindu Succession Act.

21. The intention of the donor was also clear from the recitals in Ext.A1. The donor only intended to confer a limited estate to his wife, one of the donees. "The rule of construction is well settled that the intention of the executor of a document is to be ascertained after considering all the words in their ordinary natural sense. The document is required to be read as a whole to ascertain the intention of the executant. It is also necessary to take into account the circumstances under which any particular words may have been used." (Vide (2004) 2 SCC 504) **F.M.Devaru Ganapathi Bhat** v. **Prabhakar Ganapathi Bhat**).

22. We have noticed earlier that the defendants have not pleaded in their pleadings that item Nos.1 and 2 of the plaint schedule were gifted in favour of Janaki in lieu of maintenance. There is no evidence also touching on that point. The facts and circumstances would indicate that Janaki had other self acquired properties of her own which were disposed of by her

under Ext.B1 Will in the year 1979.

23. In **Kunji Thomman and others** v. **Meenakshi and others** (AIR 1970 Kerala 284), dealing with Section 14(1) of the Hindu Succession Act, a Division Bench of this Court had occasion to consider the importance of pleadings. It was held thus:

> ".. This obviously means that she is unable by herself to maintain her and she has necessarily to depend upon the father-in-law for her maintenance. This does not mean that the daughter-in-law should be penniless. Inadequacy of her own assets to maintain herself is quite sufficient to make her a dependent of the father-in-law. But if a daughter-in-law has got properties from out of which she could have maintained herself very comfortably we do not think it right to hold that still there would be a moral obligation on the part of the father-in-law. In the absence of any moral obligation, no legal obligation against the heirs inheriting the estate can arise. Because of the absence of pleading the plaintiff was unable to meet the case now pleaded which is essentially a question of fact. We therefore hold that the plea of the appellants cannot be entertained in this Court. If so the argument based on Section 14(1) of the Hindu Succession Act need not be considered."

24. We note here that the decision cited by the learned counsel for the petitioner in **Pachu** v. **Chirutha** (2003 (1) KLT 241), does not apply to the fact situation in the case. In Pachu's case, there was a clear admission in the written statement recognizing the right of maintenance of the person concerned out of the joint properties.

25. Sri.M.C.Ratnakaran, learned counsel appearing for respondents

15 and 16 contended that the learned single Judge has found that the first defendant was in possession of item Nos.1 and 2 and, therefore, the successors of second defendant should not be made liable to pay the mesne profits. He pointed out that in the last paragraph of the judgment of the learned single Judge, it is mentioned that the second defendant and supplemental defendants 5 to 9 are liable to pay the share of mesne profits to the plaintiff. Learned counsel appearing for the plaintiff submitted that the submission made by Sri.Ratnakaran is correct. Accordingly, we hold that the legal representatives of the first defendant are liable to pay mesne profits to the plaintiff in respect of item Nos.1 and 2.

For the aforesaid reasons, we are of the view that A.F.A lacks merits and it is liable to be dismissed. Accordingly, the A.F.A is dismissed. However, it is made clear that the legal representatives of the first defendant alone shall be made liable to pay mesne profits to the plaintiff in respect of item Nos.1 and 2. No order as to costs.

(P.R.RAMAN)
Judge

(K.T.SANKARAN)
Judge

ahz/

P.R.RAMAN &
K.T.SANKARAN, JJ.

A.F.A.NO. 17 OF 2002

JUDGMENT

16th November, 2007